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VIRGINIA LAW REGISTER

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The War and the Courts. Interpretation of War Statutes.

We will not—as might be expected—quote the time-worn adage as to laws being silent while a state of war exists. At no time in the history of a nation do the courts become more important, especially in a state having a republican form of government, than during a war. For it is a well recognized fact that both the Nation and the people become to a certain degree hysterical and overstrained while war is raging and there is a tendency to sink every other consideration in the desire to win the war. It is well, therefore, to have a calm judicial body to hold in check well-meant but often ill-timed and dangerous enactments or proceedings under the guise of law, which yet are not legal. So in times of war laws and courts should never be silent but should speak in no uncertain terms when the liberty of the people is endangered. But on the other hand the courts should be extremely careful that the so-called liberty of the subject shall not be so exaggerated as to endanger the liberty of the Commonwealth—the liberty of all the people.

Every power consistent with constitutional liberty should be freely exercised and that power sustained by the courts unless it is a palpable departure from fundamental law or a plainly illegal exercise of legal functions. Every doubt should be solved in favor of the Government and the courts be very careful to see that the great powers granted to them should not be used to the detriment of the Nation's success in a struggle which, like the present one between the barbarism of the Hun and the civilization and humanity of the world, is a contest between Liberty and Tyranny Every good citizen should therefore hail with delight and approval those decisions of the courts which uphold

the hands of the Government in every effort made by any of its departments, executive or legislative, to win the war.

We alluded in our last two numbers to the able decisions of our Supreme Court of the United States in sustaining the "draft Act," or, as one of the courts has wisely used its proper name, "the Selective Service Law." Every citizen owes to his State's defense every fibre of his being and there can be no more question of the right of the State to call upon its citizens for their service in war "even to death," than there can be to question the right of self-preservation. It was of course to be presumed that in many instances men would try to evade their plain duty, and to that end would invoke the aid of the courts whenever they saw a chance of availing themselves of any technicality. These decisions sustained the law *in toto,* for it had been attacked as a whole, and no construction asked to be put upon part. We have now a decision of the United States District Court for the Northern District of California—first division—in the matter of *Boitano* vs. *District Board,* &c., which definitely construes and defines the powers of the local and district boards and decides to what extent the courts can be called upon to review their decisions. The Act gives to the President the power to exclude and discharge from the selective draft, amongst others, "those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable."

The Act also provides for the creation of local and district boards and declares that the decision of such district boards shall be final, except that the President may modify or reverse the same. The President is also authorized by the Act to make rules and regulations governing the organization and procedure of the local and district boards. Pursuant to this authorization a very elaborate course of procedure has been devised and a large number of rules promulgated.

Boitano desired to claim exemption under Section 76, Rule IX. "In class IV shall be placed (a) Any married registrant whose wife or children are mainly dependent on his labor for support." Unfortunately Boitano did not enter into the matrimonial relation until June 27th, 1917. He was then 23 years old and his wife 31. He claimed that his said wife was in that

condition which "ladies are, who love their lords" and therefore he was certainly one and a half way in the purview of said rule. And the local board agreed with him. But the district board upon an appeal by the Government felt constrained to call to that board's attention Section 72, rule V: "On May 18th, 1917, every person subject to registration had notice of his obligation to render military service to his country. The purpose of the Selective Service Law was not to suspend the institution of marriage amongst registrants, but boards should scrutinize marriage since May 18th, 1917, and especially those hastily effected since that time, to determine whether the marriage relation was entered into with a primary view of evading military service and *unless such is found not to be the case* boards are hereby authorized to disregard the relationship so established as a condition of dependency requiring deferred classification under these regulations," and held that Boitano was not entitled to deferred classification. They in fact found it was a "war marriage" and ordered Boitano from that "natural state of warfare"—Matrimony—into the unnatural state forced upon us by the Kaiser and his Huns. Boitano, naturally, objected and applied to the court for a writ of certiorari to have the decision of the district board reversed and be returned to the classification in which the local board had placed him—i. e. Class IV, division (a). There was no evidence before the board at any time tending to show affirmatively that the marriage was not entered into with a primary view of avoiding military duty and Rule V—set out above —the court seemed to think placed upon the registrant who entered into the marriage relation since May 18th, 1917, the burden of making such showing as would authorize the board to find such marriage was not entered into with that view.

The court, however, in commenting upon this point said: "This does not mean that all marriages after May 18th, 1917, shall be looked upon with suspicion, but if any circumstances in the previous history of the case as disclosed by the record induce the belief in the mind of the board that a marriage under consideration was in fact what this board denominates a 'war marriage,' the registrant must show affirmatively that such was not the case."

With this portion of the opinion of the learned judge of the district Court we feel constrained to differ. The language of the rule is, "unless such is found not to be the case, boards are authorized to disregard the relationship," and again, "boards should scrutinize marriages since May 18th, 1917, and especially those hastily effected since that time, to determine whether the marriage was entered into with a primary view of evading military duty, *and unless such is found not to be the case,* etc., etc."

Now this does seem to us not only to cast the burden of proof upon the registrant, but to bring every such marriage into suspicion. Otherwise, why say that the "board should *scrutinize*" such marriages?

Upon the question of the finality of the decision of the district board which was made final by the act itself, the learned judge very properly says that the courts can interfere with the action of that board "only when the registrant has been denied a fair hearing, when he has not been given an opportunity to be heard at all, or when the action of the board is so manifestly unfair and unjust as to make it apparent that the rights of the registrant have been disregarded and that he has been clearly wronged. And it may be said that even if the court would have reached a different conclusion from the evidence if the case were presented to it in the first instance, that fact can not be held sufficient to warrant the court in holding that the hearing accorded the registrant by the district board was unfair. * * * It was not intended that every dissatisfied registrant should find relief in the courts. Indeed, the Selective Service Law would be shorn of all its vigor and efficacy were the courts to undertake to review the action of the local and district boards in any case where it does not clearly appear that such boards have abused the great powers conferred upon them." This decision should be widely known in order that the boards and lawyers alike should know what one court at least has decided. Of the wisdom and absolute justice of this decision there can be no question.

The Duty of the Lawyer Towards the Government.

The discussion of the foregoing case and a consideration of the other cases which have reached the courts, in every one of which the Government has been sustained, necessarily should cause every lawyer to pause and seriously consider his duty towards his country when he is asked to be retained in any case in which the hands of the Government may be tied—even temporarily. To say that every man has a right to test the validity of any law affecting his person or property, may seem to be stating an axiom. But is it true? We think not. A law may be so plainly correct and just that to attempt to test it would be as foolish as to argue that twice two does not make four. And again there may arise a situation when the general peril is so great that a doubtful question should be allowed to remain in doubt until a happier and more convenient season arises for an answer. A lawyer owes a great duty to his client. He should not hesitate to take his case if in so doing he does not plainly disregard the ethics of the profession or is so situated that morally he can not consistently do so; or unless he sees plainly that the client has no case, or that the case he has is one that should not be litigated.

But he owes no greater duty to his client than to this country and he should be very chary and wary of undertaking any case which may endanger his country's cause. The High Priest said it was expedient "that one man should die for the people and that the whole nation perish not." When our best and bravest are today dying for their country in a far off land and when the freedom of our nation—indeed of all the earth—is threatened with destruction, the inconvenience—aye! the liberty and even the life of one man, should not be allowed to stand in the way of success.

The Virginia Council of Defense has passed several resolutions, amongst which are the following, to whose careful perusal we invite the attention of our brethren of the bar, and of any one who may perchance read these pages.

"WHEREAS war imposes its obligations alike upon soldier and civilian, each of whom has a patriotic duty to perform, and

neither of whom may disregard his duty without incurring contempt and opprobrium;

AND WHEREAS laws which ordinarily have to be construed with rigid consideration of the rights of individuals must in war times be applied with a mor liberal trend toward the public weal;

AND WHEREAS times of stress are not times for legal experiments,

Therefore, Be It Resolved that this conference for law enforcement convened by the Governor of Virginia calls upon all good citizens to uphold the properly constituted authorities of the State of Virginia in their efforts to uphold the laws of the Commonwealth, particularly those which either directly or indirectly may have a bearing upon the protection of the national fighting forces, or in any other manner may help toward winning the war.

Resolved Further that in the sense of this conference it is neither wise nor patriotic at this time to interpose technical objections to the enforcement of laws made to advance the interests of the nation and help the cause of civilization in its hour of peril, nor is it proper to tie the hands of officials by testing the constitutionality of such regulations.

Resolved Further that the laws be construed by the courts and enforced by the agencies for enforcement so that the public weal is paramount."

The last resolution we think hardly necessary. Courts in our judgment always try to construe the laws so that the public weal is paramount; but they are charged with an awful duty in determining whether a law passed for the purpose of making the public weal paramount is passed in such a way as to legally accomplish that object. We do not fear but that our courts will measure up to their high duty as patriots and judges of the law and will be neither narrow nor technical in this hour of the world's agony. If every inhabitant of these United States only did his duty as well as our judges do theirs, then indeed this world would be a land of law and order, peace, happiness and prosperity.

Contributions by Directors of Corporate Funds Towards Instrumentalities for Winning the War.

That Directors have no right to divert the funds of their corporation to any enterprise—charitable or otherwise—not connected with the corporations, without the consent of the stockholders, is well known to lawyers and ought to be to every member of a board. And yet we doubt if there is a single board of directors in this State which has not at some time or other violated its duty in this respect. Towards the Red Cross, the Y. M. C. A., and other organizations working for the winning of the war we know there have been many contributions absolutely without warrant of law from directors acting in their capacity as such.

The State of New York has passed an act authorizing corporations to cooperate in the maintenance of instrumentalities for the winning of the war. Chapter 240, Laws of 1918. The Hon. Charles Hughes was asked his opinion as to the validity and scope of this act. This opinion it seems to us goes very far towards holding that such action on the part of a Board of Directors is within their ordinary powers. We quote a portion of his opinion, italicizing that part of it which it seems to us goes a long way towards this view. Says the learned ex-Justice of the Supreme Court:

> "The Act, in substance, authorizes directors or trustees of corportions of this State to expend the moneys of the corporation for the support of instrumentalities conducive to the winning of the War, when in their judgment such expenditure is expedient and will contribute to the protection of the corporate interests. This is a rule governing the administration of the corporate affairs which the Legislature could have provided in the original charter of the corporation and which the Legislature, under its reserved power to amend charters or the governing corporate law, is competent in my opinion to provide by a subsequent enactment (Miller v. State, 15 Wall. 478; Sinking Fund Cases, 99 U. S. 700; Close *v.* Glenwood Cemetery, 107 U. S. 466; Lord *v.* Equitable, 194 N. Y. 212; N. Y. C. & H. R. R. Co. *v.* Williams, 199 N. Y. 108; Erie R. R. Co. *v.* Williams, 233 U. S. 685). The Act can not properly be regarded, as it seems to me, as working a deprivation of any vested right

or as defeating or substantially impairing the object of the grant to the corporation and thus as being outside the reserved power of the Legislature, but on the contrary *is plainly for the purpose of giving a definite legislative sanction to action tending to promote the security of the corporate enterprise.* The expenditures are authorized when in the judgment of the directors or trustees they will contribute to the protection of the corporate interests, and the matter is thus confided to the honest judgment of those charged with the administration of the corporate affairs.

The War is the fundamental fact in our life at this time, and the security of all our enterprises is dependent upon our conduct of the War. If we permit essential agencies for its protection to languish or fail for lack of support, if by their neglect we allow the *morale* of our forces to be impaired and our military efficiency to be undermined, and in consequence cause widespread discouragement and distrust, we should invite the gravest conditions of disorder and panic, imperilling all our undertakings which rest on stability and public confidence. In short, *the maintenance of the agencies essential to the conduct of the War and the proper care and protection of our forces during the War,* have a vital relation to the security of business undertakings *and particularly to the security of those organizations holding large accumulations.* The question *is not one of permitting the use of corporate moneys for what are or may be called 'worthy objects' outside the corporate enterprise, but for the maintenance of the very foundation of the corporate enterprise itself.*

The Government has not undertaken, through its borrowing and taxing powers, to support all the activities that are essential to the conduct of the War. It is the established policy of the Government that some of these important activities, such as those of the Red Cross, should be supported, in part or altogether, independently of governmental appropriation. But this policy is designed to enlist and encourage the active co-operation of the public and does not in any way alter the fact that these agencies are essential to the successful prosecution of the War. It would be, in my judgment, a very narrow and wholly unwarrantable view of the present situation to say that the support of the activities of the Red Cross, absolutely necessary as they are to the protection of our forces and the maintenance of their morale, is not a matter of direct and vital importance to corporate undertakings, and an act of the Legislature recognizing the plain relation of our mili-

> tary efficiency to the success of business enterprise and authorizing support by corporations of the agencies having the character described, is beyond the legislative power. Subject to statutory restrictions the directors or trustees of corporations are charged with the duty of deciding questions with respect to the expenditure of corporate moneys in the protection of corporate interests and in this case the Legislature by express enactment has wisely removed from controversy the question of legislative authority by explicitly committing the matter to the judgment of directors or trustees."

If it be true—and who can deny it—that "the question is not one of permitting the use of corporate moneys for what are, or may be called, 'worthy objects,' outside the corporate enterprise, but for the maintenance of the very foundation of the corporate enterprise itself," then why the necessity of any legislative action at all? Surely the board of directors of a corporation not only may but *must* maintain "the corporate enterprise itself," and if losing the war means the destruction of the corporate enterprise, then surely the directors have a plain right to contribute the money of the corporation to prevent such a disaster. This may seem to be—doubtless is—stretching the authority of directors a good long way, but it is the logical result of the argument of the learned Justice.

Can an Unconstitutional Law Be Made Constitutional by a Treaty.

No one for an instant would try to stand in the way of any enactment to prevent the slaughter of birds, whether migratory or otherwise, if such an enactment is made by the proper legal authority and today, when such enormous powers are granted the Federal Government in order to win the war, few of us would hesitate to approve almost any measure aimed at that most desired object.

But to call a measure a "war measure" does not always make it so. And one cannot help a slight smile at the naivete of that member of Congress who gravely urges that the protection of those birds which assist materially in saving crops by preying upon insects is necessary for the winning of the war. The ob-

ject of a bill before the Congress is to insure Federal control of bird shooting. Most of the states have passed migratory bird laws, but either these are not stringent enough or not similar enough to insure proper protection of the species. There was a Federal law passed, but it was declared unconstitutional. The same object is now attempted by a treaty between Great Britain and this country whose object is to obtain a close season in the maritime provinces of Canada and in those states that border on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay. This close season is to last throughout the year on migratory, insectiverous birds. Certain other birds are not to be shot for a period of ten years. Others are not to be shot or their eggs sold or transported. The Secretary of Agriculture is to prepare and put in force a complete schedule of rules that will attempt to carry into effect the provisions of this bill. Some old fogies with mossback ideas of a long forgotten theory called States Rights, who of course are senile and antiquated beyond the hope of recovery and rejuvenation, urge that the bill—treaty or no treaty—is unconstitutional in that the Government has no right to interfere in a subject wherein the State has police power.

Why have not these poor old creatures heard of Interstate Commerce? Are not these birds engaged in Interstate Commerce? Do they not fly from state to state carrying all sorts of things? Away with such cavilling!

And, again: Can the Department of Agriculture legislate for the states? But all this is done *by treaty,* they say. Shade of Harry Tucker to the rescue—and long may that shade cast its genial shadow—if indeed there can be a genial shadow, a smiling *eidolōn skias*—and bring against these foes of State Rights the long range gun of his *"Limitations on The Treaty Making Power."*

One of the members of the Congress has actually been guilty of arguing this:

> "I am reluctant to believe, that the police powers of a State may be taken away from it by the national Government by negotiating a treaty with a foreign country. I can not believe that what is otherwise unconstitutional as an unjus-

> tifiable invasion of powers reserved to the States may become constitutional merely because the Senate and the President of the United States, acting upon the part of this Government, shall negotiate and approve a treaty with a foreign country. According to the American system certain powers have been delegated by the States to the Federal Government. Those powers certainly cannot be extended by the negotiation of a foreign treaty."

That this gentleman has right reason and plain common sense in his views we do not hesitate for one moment to affirm. And yet, and yet—somehow or other we would like to see the birds protected. A bevy of robins on the lawn are looking at my window as I write, as if to remind me that this State *has* protected them, and a brown thrush—that wise bird who according to Browning "sings each song twice over"—is filling the air with the flute-like music of his notes. I have seen him, or one of his brethren, devour and feed to his young in an hour, of a Sunday morning almost his weight in insects. The man who would kill him or his kind ought to be put to death without mercy "as a war measure." Why will not the states wake up to their responsibilities and enact proper legislation to protect all insectivorous birds? If they do not I believe that the Editor, for one, and Harry Tucker, for another, will put the Constitution on the shelf for the period of the war, and even after it, bring evidence to prove that these birds are common carriers (Bless their pretty feathers! We apologize for the word "common") and as such are engaged in Interstate Commerce and therefore under Federal Regulation. And if "that be treason"—why it's not reached either by the Espionage Act or the Act against trading with the enemy.